

Guidelines: Ethical Supplier Mandate

Office of the Chief Advisor – Procurement

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Disclaimer

This document is intended as a guide only for the internal use and benefit of government agencies. It may not be relied on by any other party. It should be read in conjunction with the Queensland Procurement Policy, your agency's procurement policies and procedures, and any other relevant documents.

The Department of Housing and Public Works disclaims all liability that may arise from the use of this document. This guide should not be used as a substitute for obtaining appropriate probity and legal advice as may be required. In preparing this document, reasonable efforts have been made to use accurate and current information. It should be noted that information may have changed since the publication of this document. Where errors or inaccuracies are brought to attention a reasonable effort will be made to correct them.

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1 Purpose

This guidance is provided to assist in the application of the Ethical Supplier Mandate (the Mandate), approved by Executive Government for all agencies subject to the Queensland Procurement Policy.¹

2 Scope

Demerits and sanctions can be imposed on suppliers for breaches of relevant laws and policies.

The Mandate's definition of supplier includes subcontractors within the supply chain. Suppliers may be penalised for breaches by their subcontractors, except where the supplier has taken reasonable action to prevent the breach by their subcontractors.

Demerits can only be applied to a supplier if the contract where the breach occurred came into effect after the Mandate commenced. Commencement dates for the Mandate are based on the relevant category. For budget sector agencies, these include:

- Building Construction and Maintenance (BCM) Category from 1 August 2019
- Transport Infrastructure and Services (TIS) Category from 1 October 2019

The Mandate will be expanded to include suppliers for other categories of spend, and agencies including statutory bodies, government owned corporations and special purpose vehicles, at dates to be determined in 2020.

Sanctions only affect a supplier's access to future contracts. Breaches associated with established and current contracts will be dealt with using contract management processes.

3 What agencies need to do

3.1 During the procurement cycle

Before contracting with a supplier

All procuring agencies must check an online database managed by the Executive Officer, Procurement Penalties and Sanctions Committee (the Committee), as to whether a supplier is the subject of a sanction.

When going to select tender, this check must occur before inviting suppliers.

Sanctioned suppliers will not appear on the approved suppliers list.

The Executive Officer will maintain an online database so procuring agencies can check whether a supplier is the subject of a sanction.

When forming a contract with a supplier

Category lead agencies must update standard terms and conditions/standard contract suites used by government agencies to include a clause reflecting the Mandate and associated definition.

¹ Budget sector agencies, statutory bodies, government owned corporations and special purpose vehicles.

For building and construction related contracts, the clauses are:

The supplier acknowledges that a failure to comply with the principal's policies that apply to the work under the contract or the supplier's obligations under the contract can result in the imposition of a demerit or sanction under the Ethical Supplier Mandate, in addition to any other remedies available to the principal under this contract.

"Ethical Supplier Mandate" means the Queensland Government policy titled "Buy Queensland: Ethical Supplier Mandate" or any policy that replaces that policy.

Additional clauses will be issued as the Mandate progressively expands to cover more categories.

Category lead agencies must add these clauses into category terms and conditions/standard contract suites and agencies must use them in all relevant contract and tender documents.

3.2 To investigate alleged breaches

Procuring agencies are responsible for investigating alleged breaches to determine whether the matter should be escalated to the Committee.

The Committee will only consider a demerit decision when an agency has provided factual evidence of breach of a policy requirement.

4 Conducting investigations

Investigations under the Mandate are to be conducted in accordance with AS/NZS 10002:200014 *Guidelines for complaint management in organisations*. A copy of the standard can be purchased here www.standards.org.au.

In conducting investigations consistent with AS/NZS 10002:200014, procuring agencies will ensure the scale of the investigation is commensurate with the complexity and significance of the alleged breach.

5 Decision making

5.1 Decisions must be made objectively

The Committee must act objectively at all times. Committee members or related stakeholders must not directly contact suppliers regarding an alleged breach.

Committee decisions:

- will be supported by sufficient evidence. The Committee will not progress a demerit decision where an agency has not provided factual evidence of breach of a policy requirement
- will not be affected by any conflict of interest. That is, Committee members are not to participate in Committee decisions where they declare a conflict of interest
- will be consistent. The Executive Officer will provide Committee members with relevant precedent decisions
- can only be made when the majority of members present are in agreement
- will reference legal advice before imposing demerits or a sanction.

The Committee must not be advised of, or consider, a supplier's existing demerit allocations when making their decisions.

Information shared with the Committee must be maintained securely and confidentially, and treated in accordance with relevant legislation like the *Information Privacy Act 2009*.

Conflicts of interest

All conflicts of interest will be dealt with under section 186 of the *Public Service Act 2008*, which requires public servants to disclose conflicts of interest. Public service employees are required to disclose conflicts to their chief executive and cease taking any action unless authorised by the chief executive. Declaration of conflicts of interest will be the first agenda item at Committee meetings.

If a conflict of interest is identified and disclosed, the relevant Committee member will stop any further involvement with assessing the alleged breach and be replaced by a suitable Deputy Director-General without a conflict.

5.2 Decisions must be made by majority

There must be at least four Committee members (or approved proxies) present in order for a demerit or sanction determination to be made. Decisions can only be made when the majority of members present are in agreement.

6 Procedural fairness

6.1 Procedural fairness requirements

Suppliers must be given procedural fairness in relation to investigations and Committee decisions. This includes the right to respond to allegations of breaches.

Suppliers must be given notice of a proposed decision, including adequate detail about the particulars of the alleged breach, the evidence that supports the alleged breach and the proposed demerit or sanction. This is outlined in greater detail later in this document.

Suppliers must be allowed 10 business days to respond. An extension may be granted if the supplier provides a reasonable request for further time.

The Committee has discretion regarding whether to issue demerits or a sanction. The Committee must consider a suppliers' submission when making its decisions.

6.2 If a possible breach is identified

When a possible breach is identified, the procuring agency will determine whether it was a breach of policy or legislation.

If it is a breach of legislation (such as correctly paying wages or superannuation), it will be referred to the relevant law enforcement agency or regulator. There will be no further action until that law enforcement agency or regulator has determined whether a breach occurred.

If it is a possible breach in Queensland Government policy or commitments made during the tender process (such as hiring apprentices), the procuring agency will investigate the matter and issue the supplier with a Show Cause Notice.

After assessing the supplier's response, the procuring agency will either:

- escalate the issue to the Committee within five business days if the allegations appear valid
- request the Committee grant additional time to seek further advice or conduct further investigations, or
- take no further action and advise the supplier in writing if the allegations are invalid.

The Committee will only consider a demerit decision when an agency has provided factual evidence of breach of a policy requirement.

6.3 If a demerit may be issued

Before the Committee considers issuing demerits, the supplier will receive a written Extenuating Circumstances Notice (see Section 6.6) and given 10 business days to detail any extenuating circumstances that it would like to have considered. The Committee must factor those circumstances into their decision.

After assessing the supplier's response, the Committee will either:

- issue two, five, or ten demerits per breach, or
- take no further action, at their discretion.

If the Committee finds that a breach falls between the minor, moderate, and major categories, the number of demerits applied will be the lesser of the two options.

If the Committee decides to take no action, the Committee's Executive Officer will advise the supplier and procuring agency in writing.

If the Committee issues demerits, the Committee's Executive Officer will advise the supplier in writing that demerits have been issued and that the demerit(s) will expire after 12 months from the date of the written notice (see Section 6.7).

Demerit information will remain confidential. It will not be made available to procuring agencies.

6.4 If a sanction may be issued

The Committee will sanction suppliers once the supplier has received 20 demerits, unless it determines otherwise.

Before the Committee considers imposing a sanction, the supplier will be issued a written Extenuating Circumstances Notice (see Section 6.6) and offered 10 business days to detail any extenuating circumstances that it would like to have considered by the Committee. The Committee must factor those circumstances into their decision.

After assessing the supplier's response, the Committee will either:

- determine and issue an appropriate sanction, or
- take no further action, at their discretion.

Sanctions are outlined in Section 7 of this document.

If the Committee issues a sanction, the Committee's Executive Officer will advise the supplier in writing that a sanction has been issued (see Section 7.1). This notice must also inform the supplier that they have ten business days to appeal to the Director-General (as defined in the Mandate), or as otherwise required by the National Prequalification System for Civil (Road and Bridge) Construction Contracts (NPS).

6.5 Show Cause Notice

When a procuring agency finds a breach, suppliers will be issued with a formal Show Cause Notice and given the right to reply to the issues raised in the notice. The Show Cause Notice must:

- state that it is a notice under the Mandate
- specify the alleged breach in adequate detail
- include any evidence that supports the alleged breach
- invite the supplier to Show Cause
- state that the supplier must reply and Show Cause within 10 business days.

If the supplier does not respond or show reasonable cause by the time specified in a Show Cause Notice, the procuring agency may escalate the issue to the Committee without further notice to the supplier.

6.6 Extenuating Circumstances Notice

There are two clear points where suppliers will be issued with a formal Extenuating Circumstances Notice and given the right to reply to the issues raised in the notice:

1. before the Committee considers issuing demerits
2. before the Committee considers imposing a sanction.

The Extenuating Circumstances Notice must:

- state that it is a notice under the Mandate
- specify the alleged breach in adequate detail
- include any relevant evidence
- specify the proposed demerit or sanction
- invite the supplier to provide extenuating circumstances that it would like to have considered
- state that extenuating circumstances may not include whether the alleged breach occurred
- state that the supplier must reply within 10 business days.

If the supplier does not respond by the time specified in an Extenuating Circumstances Notice, the Committee may issue demerits or sanctions without further input from the supplier.

6.7 Demerits Notice

A supplier will be notified in writing if the Committee issues them with demerits. The Demerits Notice must:

- state that it is a notice under the Mandate
- specify the breach in adequate detail
- state the number of demerits issued by the Committee
- state that the demerit(s) will expire after 12 months from the date of the notice
- state that this will not affect their access to future procurement opportunities unless they accumulate 20 demerit points within a 12 month period.

7 Sanctions

The Committee will sanction a supplier once the supplier has received 20 demerits, unless it determines otherwise. Sanctions only affect a supplier's access to future contracts. Breaches associated with established and current contracts will be dealt with using contract management processes.

Sanctions include, but are not limited to:

- suspending a supplier's prequalification for a defined period
- making a supplier ineligible for contract award for a defined period
- suspending a supplier from the relevant panel or contracting framework for a defined period
- precluding a supplier's existing contract from being extended.

Sanction information will be shared with procuring agencies and referred to the administrators of prequalification and registration systems for implementation.

Suspensions may be revoked under exceptional circumstances (e.g. natural disasters) by the appropriate Director-General, or Directors-General, responsible for the whole-of-government management of any category of spend which has included the supplier within the last 12 months. The Committee must be consulted in the making of a revocation decision.

7.1 Sanction Notice

A supplier will be notified in writing if the Committee applies a sanction and limits access to future procurement opportunities.

The Sanction Notice must:

- state that it is a notice under the Mandate
- specify the breach in adequate detail
- specify the sanction determined by the Committee
- state the duration of the sanction
- inform the supplier that they have ten business days to appeal to the Director-General (as defined in the Mandate) or as otherwise required by the NPS.

8 Appeals

A supplier can appeal against the application of demerits or a sanction if they believe the process outlined in the Mandate has not been followed, or the Committee failed to take extenuating circumstances into account.

The appeal may be made to the relevant Director-General. This must occur within ten business days from the date the Sanction Notice was received.

The appeal process is not an opportunity to revisit the matter that gave rise to the demerits or sanction. Suppliers may appeal only on the basis that the process was not followed (as outlined in the Ethical Supplier Mandate) or that it failed to take into account extenuating circumstances provided by the supplier.

The Director-General's decision will be considered final.